**TRADE OCEAN EXPORTERS SDN BHD**

**v.**

**ARAB-MALAYSIAN FINANCE BHD & OTHER CASES**

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM JC
[SUITS NOS: D7-22-183-2000, D7-22-210-2002
& D7-(04)-22-1149-2002]
25 JUNE 2009

***HIRE PURCHASE:*** *Hire Purchase agreement - Misrepresentation - Whether the owner and/or dealer misrepresented to the hirer that the vehicle was new or second-hand - Whether imported used car was a brand new car - Vehicle cannot be new just by reference to first registration of ownership in registration card - Whether hirer aware vehicle was an imported used car from the outset*

***HIRE PURCHASE:*** *Breach of agreement - Implied warranty of quiet possession - Seizure of vehicle by Royal Malaysian Customs & Excise Dept - Whether owner liable for deprivation of possession and use of vehicle*

***HIRE PURCHASE:*** *Hire Purchase agreement - Guarantee - Liability of guarantor - Whether guarantee imposed further and other liabilities on guarantor in nature of indemnity - Whether guarantor ultimately liable for sums exceeding those from hirer - Whether execution of guarantee to be witnessed by magistrate, commissioner for oaths or notary public - Hire Purchase Act 1967, s. 22*

This case revolved around the hire-purchase of a Mercedes Benz W220 S320L bearing registration number WGY 911 (the vehicle). In July 1999, Ace Active Trade (M) Sdn Bhd (the dealer) sold the vehicle to Trade Ocean Exporters Sdn Bhd (the hirer) at the purchase price of RM943,002.75 and the vehicle was delivered to the hirer. The deposit sum was RM289,250. The hirer paid RM68,000. Cheques for the balance sum were issued twice but on both occasions, the cheques bounced. Arab-Malaysian Finance Berhad (the owner) paid the dealer the balance purchase price of RM700,000. On 24 July 1999, the hirer entered into a hire purchase agreement with the owner wherein the hirer agreed to pay the owner 60 monthly installments of RM15,750 each starting from 24 August 1999. This agreement was witnessed by a single witness and was governed by the Hire-Purchase Act 1967 (Act 212). Pang Tee Chian @ Phang Nyiok Pan (the guarantor) also executed a

guarantee agreement with the owner on 24 July 1999. On the documents related to the hire-purchase, including the guarantee, the vehicle was depicted as a "one unit new" vehicle. The hirer defaulted and a 4th schedule notice of intention to re-possess was issued on 25 September 1999. Five days later, the hirer received the registration card and observed the presence of an endorsement on the card that the vehicle was an imported used car (kenderaan import terpakai). The hirer then sought an explanation from the owner *vide* letter dated 30 September 1999. Customs seized the vehicle from the hirer on 5 November 1999. Subsequently, Customs returned the vehicle to the owner but not till more than a year later on 9 December 2000. A Notice under the 5th Schedule was then issued by the owner to the hirer. By this Notice and by letter dated 14 December 2000, the hirer was given the option of taking back the vehicle by settling the installments that were in arrears or to purchase the vehicle by paying the full balance outstanding. This option was offered several times to the hirer through letters dated 5 April 2001 and 4 September 2001. The hirer did not respond. The owner is now Am Finance Berhad having acquired all the assets and entire undertaking of the former owner, Arab-Malaysian Finance Berhad *vide* vesting order dated 21 May 2002.

Three suits were filed; the first under KL High Court D7-22-183-2000 by the hirer against the owner, the second under KL High Court D7-22-210-2002 by the owner against the guarantor and the third under KL Sessions Court Summons No. 52-17304-1999 renumbered as D7 (D4)-22-1149-2002 by the dealer against the hirer.

On the first issue whether the owner and/or dealer misrepresented to the hirer that the vehicle was new or second-hand, both the dealer and owner insisted that an imported used car was still a brand new car but the hirer said otherwise. The dealer relied on the findings of Puspakom dated 14 July 1999 where the details of the vehicle was listed under the column "Baru" as opposed to "Lama". The owner relied on the Registration Card issued by the Road Transport Department where the hirer was registered as the first owner thus the vehicle was understood as new. The hirer argued the newness of the vehicle was an important consideration when deciding whether or not to enter into a hire-purchase arrangement for a vehicle. Likewise, if the vehicle was a used car there was a misrepresentation under s. 18 of the Contracts Act 1950 entitling the hirer to treat the agreement as void.

The second issue pertained to whether the hirer had complied with the terms of payment of the deposit to the dealer. The third issue related to the effect of the seizure of the vehicle by the Royal Malaysian Customs & Excise Dept on 5 November 1999. The hirer maintained that there was a violation of the implied warranty of quiet possession of the vehicle under s. 7(1)(a) of Act 212. Thus the hirer had the right to terminate the agreement and sue for damages for loss of use of the vehicle as well as seek a refund of all monies paid under the agreement.

**Held (dismissing hirer's claim against owner and allowing owner's counterclaim against hirer in KL High Court D7-22-183-2000 suit; dismissing owner's claim against guarantor in KL High Court D7-22-210-2002 suit; allowing dealer's claim against hirer and dismissing hirer's counterclaim against dealer in the KL Sessions Court Summons No. 52-17304-1999 renumbered as D7 (D4)-22-1149-2002 suit):**

**(1)** The court disagreed with the owner and dealer's submissions as their interpretation of the first issue would be too restrictive. While the interpretation had to be made in the context of Act 212, it was the intention of the parties that was critical. Apart from value, this determination had bearing on the respective rights and liabilities of the parties to the hire-purchase agreement. This could be seen from Part III and s. 40 of Act 212. (para 13)

**(2)** The word "new" must be given its natural English meaning. According to the Oxford Dictionary it means "now first made, invented, introduced, known, heard of, experienced, or discovered ..." Given this, an imported used car cannot by any stretch of logic be new just by reference to first registration of ownership in the Registration Card. The fact that the vehicle had been previously used, regardless of by whom and where, prevented it from being said to be new. Nevertheless, even though the vehicle was not new, there was no misrepresentation. From the particulars recorded in the Registration Card, it appeared that the parties, in particular, the hirer, were well aware of the fact that the vehicle in question was an imported used car from the outset. Accordingly the first issue was in favour of the owner and the dealer. (paras 14-18)

**(3)** The hirer's contention that the since the dealer had issued to the owner and the hirer an invoice holding out that the deposit of RM289,250 had been paid, then it must be said that the deposit had indeed been paid was unacceptable. At the material

time of issuance of that invoice the payment of the balance of the deposit had been made but the cheques were dishonoured later. As these sums had not in fact been paid, and there being no misrepresentation, these sums were therefore due to the dealer. (paras 19-21)

**(4)** Section 7 Act 212 imposed certain defined warranties and conditions into hire-purchase agreements. This protection was implied regardless of whether the goods were new or second-hand. Although it was open to the owner to repossess the vehicle by reason of the hirer's non-payment of the installments, the owner did not. The hirer was allowed to continue possession of the vehicle until it was seized by Customs in November. Once seized, there was deprivation of the possession and use of the vehicle. Such deprivation for any period of time during the period of hire-purchase was a breach of the implied right of quiet possession of the vehicle. However, it was clear that the deprivation was caused by Customs and not by the owner. Consequently, the basis for the claim of the hirer was not sustainable. *Ahmad Ismail v. Malayan Motor Company & Anor* (refd). (paras 22-29)

**(5)** The guarantor's guarantee was for all sums which may become payable by the hirer as arising under the agreement. Looking at cls. 1, 3 and 4 of the guarantee, it was obvious that the first two clauses establish the first level of obligations arising under the hire-purchase agreement. However, cl. 4 imposed further and other liabilities on the guarantor in the nature of an indemnity that is, the liability to "further indemnify the owner against all actions, proceedings, claims and demands whatsoever made by the Hirer arising out of any alleged warranty and/or representation or otherwise in respect of the Goods". This would mean that the sum the guarantor may ultimately be liable for would exceed the sum due from the hirer. In such a case, the guarantee must be witnessed by a magistrate, commissioner for oaths or a notary public as required under s. 22 of Act 212 or else it shall be void. As the guarantee here was not witnessed by the appropriate person mentioned in s. 22 the guarantee was void. Accordingly the owner's claim against the guarantor in KL High Court D7-22-210-2002 was dismissed. *Su Chii Leong v. Orix Credit Malaysia Sdn Bhd* (foll). (paras 30-36)

**Case(s) referred to:**
*Ahmad Ismail v. Malaya Motor Co & Anor [1973] 1 LNS 1 FC* ***(refd)***
*Su Chii Leong v. Orix Credit Malaysia Sdn Bhd [2004] 1 CLJ 684 HC* ***(foll)***

**Legislation referred to:**
Contracts Act 1950, s. 18
Hire Purchase Act 1967, ss. 7(1)(a), (b), (4), 22, 40

*(Suit No: D7-22-183-2000)*
*For the plaintiff - Mureli Navaratnam; M/s Mureli Navaratnam*
*For the defendant - Hargopal Singh; M/s Hargopal Singh & Co*

*(Suit No: D7-22-210-2002)*
*For the plaintiff - Hargopal Singh; M/s Hargopal Singh & Co*
*For the defendant - Mureli Navaratnam; M/s Mureli Navaratnam*

*(Suit No: D7-(4)-22-1149-2002)*
*For the plaintiff - Hanif Idris (Dir Kheizwan with him); M/s Fozi Zain & Partners*
*For the defendant - Mureli Navaratnam; M/s Mureli Navaratnam*

*Reported by Susheila Sreedharan*

## JUDGMENT

**Mary Lim JC:**

**[1]** Pursuant to order of court dated 24 September 2003, these three cases were ordered to be heard together.

**[2]** The facts and issues in this case revolve around the hire-purchase of a Mercedes Benz W220 S320L bearing registration number WGY 911 (vehicle). On the first day of trial, the parties reached further consensus on how the trial was to proceed. Because of the nature of the claims, cross-claims and defences, the parties were referred to respectively as the dealer, owner, hirer and guarantor.

**[3]** In respect of evidence the parties agreed to rely on affidavits or witness statements, as the case may be. The dealer relied on the affidavit and witness statement of Syed Omar Shahabuddin bin Syed Abdullah (Syed) the owner; on the affidavits of Tan Wee Sen (Tan) and Shirley Ong Gek Lian (Shirley); and finally, both the hirer and the guarantor relied on the affidavit of Pang Tee Chiang @ Phang Nyiok Pan (Pang).

**[4]** To facilitate the arguments, a Chronology of Events as gleaned from the affidavit and documentary evidence filed was also prepared by the parties:

| No. | Date | Events |
|---|---|---|
| 1. | July 1999 | The dealer sold the vehicle to the hirer at the purchase price of RM943,002.75 |
| 2. | 16.7.1999 | The vehicle was delivered to the hirer |
| 3. | 16.7.1999 | The hirer issued a Cheque No: 437730 for RM175,002.75 to the dealer |
| 4. | 22.7.1999 | Cheque No: 437730 was dishonoured |
| 5. | 24.7.1999 | The hirer issued a replacement Cheque No: 437735 for RM175,002.75 to the dealer |
| 6. | 24.7.1999 | The hirer entered into hire purchase agreement with the owner |
| 7. | 24.7.1999 | The guarantor executed guarantee agreement with the owner |
| 8. | 26.7.1999 | Cheque No: 437735 was dishonoured |
| 9. | 3.8.1999 | Dealer informed the hirer that the 2nd cheques were dishonoured |
| 10. | 15.9.1999 | Letter of demand was issued by the dealer's solicitors, Messrs Fozi Zain & Partners |
| 11. | 25.9.1999 | Fourth Schedule Notice served on the hirer by the owner |
| 12. | 30.9.1999 | The registration card of the vehicle was forwarded to the hirer |
| 13. | 30.9.1999 | The hirer informed the owner that the registration card states that the vehicle is an imported used car |
| 14. | 9.10.1999 | Notice under Rule (3) of the Hire Purchase Regulations (Repossession and Maintenance of Records) 1976 was served on hirer |
| 15. | 5.11.1999 | The vehicle was detained by Royal Customs and Excise Department |
| 16. | 1.12.2000 | The vehicle was released by the Royal Customs and Excise Department and informed that no offence been committed with regard to the vehicle |

| | | |
|---|---|---|
| 17. | 9.12.2000 | The owner took back vehicle from the Royal Custom and Excise Department |
| 18. | 13.12.2000 | Notice of intention to repossess (Fifth Schedule Notice) dated 13.12.2000 was served on the hirer and guarantor |
| 19. | 16.1.2002 | Notice of demand served to the guarantor by the owner |
| 20. | January - March 2001 | Advertisements in The China Press – auction |
| 21. | 5.4.2001 | The owner informed the hirer and the guarantor the auction was unsuccessful |
| 22. | 29.11.2001 | The owner received a tender from Dato' Azizul Rahman bin Samad for RM545,000.00 |
| 23. | 5.12.2001 | The car was sold to Dato' Azizul Rahman |
| 24. | 11.3.2002 | The owner received the sales proceeds of RM545,000.00. |

**[5]** The parties further agreed on salient facts. Under the hire-purchase agreement dated 24 July 1999 for the hire of the vehicle, the hirer agreed to pay the owner 60 monthly installments of RM15,750 each starting from 24 August 1999. This agreement witnessed by a single witness is governed by the Hire-Purchase Act 1967 (Act 212). The owner paid the dealer the balance purchase price of RM700,000. The vehicle was detained by the Royal Malaysian Customs and Excise department on 5 November 1999. The owner is now Am Finance Berhad having acquired all the assets and entire undertaking of the former owner, Arab Malaysian Finance Berhad *vide* vesting order dated 21 May 2002. On the first day of trial, the name of the owner was further amended (orally) to AmBank (M) Berhad.

**[6]** Three bundles of agreed documents marked respectively as A, A1 and A2 were also prepared. The parties had also narrowed the issues for determination to the following:

a. Whether the owner and/or dealer misrepresented to the hirer that the Mercedes Benz W220 S320L bearing registration number WGY 911 (vehicle) was new or second-hand?

b. Whether the hirer had complied with the terms of payment of the deposit to the dealer?

A c. What is the effect of the seizure of the vehicle by the Royal Malaysian Customs & Excise on or about 5 November 1999?

**First Issue: Whether The Owner And/Or Dealer Misrepresented To The Hirer That The Mercedes Benz W220 S320l Bearing Registration Number WGY 911 (Vehicle) Was New Or Second-hand?**

B

**[7]** For this issue, it is helpful to see the relevant facts. The hirer wanted to buy a brand new vehicle – see Q&A 7 of Pang's statement. The dealer knew that the hirer wanted a brand new C vehicle. A vehicle was identified and then registered on 16 July 1999. Upon registration, the vehicle was delivered to the hirer on the same date. The hire-purchase agreement was then entered into on 24 July 1999. On the documents related to the hire-purchase, including the guarantee, the vehicle was depicted as a "one unit D new" vehicle. The hirer defaulted and a 4th Schedule Notice of Intention to Re-possess was issued on 25 September 1999. Five days later, the hirer received the registration card and observed the presence of an endorsement on the card that the vehicle was an imported used car (kenderaan import terpakai). The hirer then E sought an explanation from the owner *vide* letter dated 30 September 1999. Briefly, the letter indicated the hirer was "very shocked to find out that the Mercedes is an imported used car and not brand new as thought by us". Although there was a response through the owner's solicitors, no explanation was in fact offered. The hirer then refused to pay.

F

**[8]** From the above and despite not establishing the basis for the Road Transport Department's endorsement of the vehicle as an imported used car, the parties made their respective submissions on the status of the vehicle as a given fact. The submissions have been G on the interpretation of this issue within the context of the Hire Purchase Act 1967 (Act 212).

**[9]** Both the dealer and the owner insist that an imported used car is still a brand new car. The hirer says otherwise.

H **[10]** The dealer took the view that the imported used car is still a brand new car relying on the findings of Puspakom dated 14 July 1999 as appearing at p. 28 Bundle A – see Q&A 4 in Syed's statement. According to this report the details of the vehicle are listed under the column "Baru" as opposed to "Lama".

I

**[11]** The owner on the other hand, relied on the Registration Card issued by the Road Transport Department. If the hirer is registered as the first owner in the Registration Card, then the vehicle is understood as "new" bearing the meaning of "first-hand". Where the hirer is the second or subsequent owner of the vehicle on the Registration Card, then the vehicle will be understood as "second-hand". The age or rather the date/year of manufacture of vehicle and the usage of the vehicle are immaterial considerations – see Q&A 8 and 9 of Tan's statement and Q&A 17 of Shirley's statement.

**[12]** The hirer argued the newness of the vehicle was an important consideration when deciding whether or not to enter into a hire-purchase arrangement for a vehicle. Hence, the use of the term "brand new". This was reflected in the relevant documents of the hire-purchase. If the vehicle turned out to be in fact a used car, then there is misrepresentation within s. 18 of the Contracts Act 1950 to which the hirer was entitled to treat the agreement as void. The word "new" as used in the documentation simply meant not used and had nothing to do with first registration of ownership as proposed by the owner and the dealer.

**[13]** With respect, I do not agree with the submissions of learned counsel for the owner and the dealer. Their interpretation would be too restrictive. While it is clear that the interpretation has to be made in the context of Act 212, it is the intention of the parties that is critical. Apart from value, this determination has bearing on the respective rights and liabilities of the parties to the hire-purchase agreement. This can be seen from Part III and s. 40 of Act 212. What would have been insightful to this determination would have been the form completed pursuant to the 2nd Schedule. This form is a mandatory requisite under s. 4, the absence of which renders the agreement void and opens the parties who have failed to prepare such a document liable for an offence under that same provision. That form was not tendered. I shall assume that there is such a document and it must have been appropriately completed as a new and not second-hand vehicle. This is consistent with the holding out in the subsequent agreement, that the vehicle is new.

**[14]** Now, the word "new" must be given its natural English meaning. According to the Oxford Dictionary it means "now first made, invented, introduced, known, heard of, experienced, or discovered ... " Given this, an imported used car cannot by any

stretch of logic be new just by reference to first registration of ownership in the Registration Card. The fact that the vehicle has been previously used, regardless of by whom and where, prevents it from being said to be new. Such a vehicle is second-hand.

**[15]** However, that is immaterial on the facts of this case. Even though the vehicle was not new, there was no misrepresentation. From the particulars recorded in the Registration Card dated 16 July 1999, it appears that the parties, in particular, the hirer, were well aware of the fact that the vehicle in question was an imported used car from the outset. There are two endorsements on the registration card. One pertains to the fact that the vehicle was an imported used car while the other refers to the claim by the owner. The signature of the hirer also appears on the registration card. Since there are no other dates appearing on the registration card, it is reasonable for me to conclude the endorsements and the hirer's signature must have been affixed on the registration card at or around the same date of registration on 16 July 1999.

**[16]** The evidence also show that the hirer had been in default of payment even before the Registration Card was forwarded to the hirer. Although the hirer made protestations on the status of the vehicle upon receipt of the Registration Card, it is obvious that the refusal to pay had nothing to do with the status of the vehicle.

**[17]** In the circumstances, regardless of what was held out on the documentation, it is evident on the facts that the hirer accepted that an imported used car was new. It would have been beneficial if evidence was led as to the difference in value between a brand new and an imported used Mercedes Benz W220 S320L. But since there is none, I can only find that the hirer entered into the arrangements with the respective parties on the terms as appearing in the relevant documentation.

**[18]** The first issue is therefore answered in favour of the owner and the dealer.

**Whether The Hirer Had Complied With The Terms Of Payment Of The Deposit To The Dealer?**

**[19]** This issue is relevant between the hirer and the dealer. The amount due as deposit was RM289,250. The hirer paid RM68,000. Cheques for the balance sum were issued twice but on both occasions, the cheques bounced.

**[20]** In his submissions, learned counsel for the hirer submitted that the since the dealer had issued to the owner and the hirer an invoice holding out that the deposit of RM289,250 had been paid, then it must be said that the deposit had indeed been paid – see p. 70 Bundle A. I believe this is a rather tongue-in-cheek argument. At the material time of issuance of that invoice the payment of the balance of the deposit had been made. But the cheques were dishonoured later.

**[21]** Since these sums have not in fact been paid, and there being no misrepresentation, these sums are therefore due to the dealer.

**What Is The Effect Of The Seizure Of The Vehicle By The Royal Malaysian Customs & Excise On Or About 5 November 1999?**

**[22]** In this regard, Customs seized the vehicle from the hirer on 5 November 1999. Subsequently, Customs returned the vehicle to the owner but not till more than a year later on 9 December 2000. A Notice under the 5th Schedule was then issued by the owner to the hirer. By this Notice and by letter dated 14 December 2000 (p. 47 Bundle A), the hirer was given the option of taking back the vehicle by settling the installments that were in arrears or to purchase the vehicle by paying the full balance outstanding. This option was offered several times to the hirer through letters dated 5 April 2001 and 4 September 2001. The hirer did not respond.

**[23]** The submission of the hirer is by reason of the seizure of the vehicle by Customs, there is a violation of the implied warranty of quiet possession of the vehicle provided under s. 7(1)(a) of Act 212. The hirer lost possession of the vehicle during this period of seizure. Section 7(1)(a) of Act 212 provides:

> 7. (1) In every hire-purchase agreement there shall be:
>
> (a) an implied warranty that the hirer shall have and enjoy quiet possession of the goods;

**[24]** It was further submitted that a violation of s. 7(1)(a) provided the hirer the right to terminate the agreement and sue for damages for loss of use of the vehicle as well as seek a refund of all monies paid under the agreement. Those monies being the deposit supposedly paid to the dealer. The hirer also counter-claimed against the dealer alleging non-payment of duties by the dealer resulted in the seizure of the vehicle.

**[25]** Insofar as damage is concerned, it was the submission of learned counsel for the owner that when Customs returned the vehicle, the hirer ought to have taken the vehicle back. The owner was not responsible for the breach as it was directly caused by Customs and the hirer's own refusal in taking back the vehicle.

**[26]** This issue is really relevant between the hirer and the owner as the evidence reveal that there was no offence committed by any of the parties in this case. Certainly not in the manner alleged by the hirer against the dealer. By the time of the seizure by Customs on 5 November 1999, this implied warranty is owed by the owner. By then too, the dealer must have been paid the balance of the purchase price. Ownership of the vehicle would have been transferred from the dealer to the owner so that the latter may pass title to the hirer at the appropriate time.

**[27]** Having considered the relevant facts and the submissions of learned counsel, I am of the view that s. 7 imposes certain defined warranties and conditions into hire-purchase agreements. This protection is implied regardless of whether the goods are new or second-hand. Although it was open to the owner to repossess the vehicle by reason of the hirer's non-payment of the installments, the owner did not. The hirer was allowed to continue possession of the vehicle until it was seized by Customs in November. Once seized, there was deprivation of the possession and use of the vehicle. Such deprivation for any period of time during the period of hire-purchase is a breach of the implied right of quiet possession of the vehicle.

**[28]** However, on the facts of this case, it is clear that the deprivation is caused by Customs and not by the owner and for which the owner should be liable – see Federal Court decision in *Ahmad Ismail v. Malaya Motor Company & Anor* [1973] 1 LNS 1 affirming the decision of the High Court found in [1972] 1 LNS 5. The authorities cited by learned counsel for the hirer concern instances when there was inability to convey title under s. 7(1)(b) read together with s. 7(4) of Act 212. This does not arise here as the evidence neither indicates any termination of the agreement by the hirer nor intention on the part of the hirer to pay all sums due under the agreement and the owner was unable to pass good title. In *Ahmad Ismail*, the Federal Court dismissed the appeal brought by the hirer of a second-hand vehicle against the finance company finding *inter alia* that the performance of the contract was made impossible not by the act of the finance company but by the intervention of a third party, the police. The

police had seized the car on suspicion of it being a stolen car. The implied condition in that case was the right of the finance company to pass good title at the relevant time. While the main contention in this aspect of the case concerns the implied condition of quiet possession, the principle is the same. The deprivation of this implied condition is not occasioned by the owner and the owner is therefore not liable.

**[29]** In the circumstances, the basis for the claim of the hirer is not sustainable.

**[30]** A final issue raised concerned the application of s. 22 of Act 212 and it relates to the claim against the guarantor. The issue is this. The guarantor's guarantee is for all sums which may become payable by the hirer as arising under the agreement. However, clause 4 in the guarantee imposes further and other liabilities on the guarantor, that is, the liability to "further indemnify the owner (you) against all actions, proceedings, claims and demands whatsoever made by the Hirer arising out of any alleged warranty and/or representation or otherwise in respect of the Goods". This would mean that the sum the guarantor may ultimately be liable for would exceed the sum due from the hirer. In which case, the guarantee must be witnessed by the appropriate person mentioned in s. 22. Where it is not so witnessed, the guarantee is void.

**[31]** The guarantee here as seen at p. 29 Bundle A was witnessed by one Khor Geok Swan. This person is not a magistrate, commissioner for oaths or a notary public as required under section 22.

**[32]** Section 22 reads as follows:

> Where a guarantor of a performance of the obligations of the hirer under a hire-purchase agreement enters into an agreement binding the guarantor:
>
> (a) to pay to the owner an aggregate sum which is larger than the balance originally payable under the agreement; or
>
> (b) to perform an obligation in respect of goods other than the goods comprised in the hire-purchase agreement,
>
> the agreement so entered shall be void unless the agreement is executed by the guarantor in the presence of a Magistrate, a Commissioner for Oaths or a Notary Public.

**[33]** The response of the owner is simple – the guarantor at all times is only liable for the amount originally payable under the agreement, that is RM945,000 and nothing more. This sum will cap

any monies due from the guarantor. From the notices sent and the monies recouped from the auction of the vehicle, learned counsel attempted to show that the amount due under the claim would be far below that sum.

**[34]** That may well be so. But the real question is when this pertinent issue should be addressed, at the time of agreement or at the time of enforcement. To accept the argument suggested by the owner would be to determine the issue at the time of enforcement and this surely cannot be right. The material time must be at the time of contracting when considerations such as the extent of the guarantor's liability in the event of a default are weighed and a decision then taken. After all, the guarantor's liability arises only upon default of the primary debtor and not earlier. Hence, it is only appropriate that this factor is taken into account before the conclusion or execution of contract. A similar issue arose in *Su Chii Leong v. Orix Credit Malaysia Sdn Bhd* [2004] 1 CLJ 684 where Clement Skinner J opined @ p 690:

> The point of time at which the guarantor becomes bound under the guarantee is when he executes it although no liability to indemnify or pay thereunder will arise until default under the hire-purchase agreement occurs. Notwithstanding the fact that liability under a guarantee is a contingent event which may never materialise, it would only be possible to say that a guarantor has entered into his obligations with open eyes and has had an opportunity to independently decide whether to become so bound or not if he is aware of or has had the opportunity of making himself aware of what he is binding himself to. It must follow therefore that the point of time at which he must 'open' his eyes and be fully appreciative of the consequence of entering into the guarantee is when he executes it and not *ex-post facto*.

**[35]** Looking at cls. 1, 3 and 4 of the guarantee, it is obvious that the first two clauses establish the first level of obligations so to speak, those arising under the hire-purchase agreement. Where such sums are not paid by the hirer, the guarantor promises to pay or promises that such sums may be recovered against the guarantor. In the context of cl. 4, the obligation is different. It is first of all in the nature of an indemnity. And the indemnity is with regard to actions etc. that may be brought by the hirer against the owner. This would include the current action where one of the earlier issues discussed relates to alleged warranty or representation in respect of the vehicle. Next, from its opening words, the liability is in addition to the liability already spelt out in the earlier clauses.

**[36]** In the circumstances, I find the guarantee void.

**[37]** In view of the above findings and based on the evidence before me with regard damage, the orders I shall make in respect of each action is as follows:

a. KL High Court D7-22-183-2000 by the hirer against the owner, the claim is dismissed and the counter-claim of the owner against the hirer is allowed to the sum of RM273,349.73 together with interest at 8% per annum from 12.3.2002 till realization.

b. KL High Court D7-22-210-2002 by the owner against the guarantor is dismissed.

c. KL Sessions Court Summons No. 52-17304-1999 renumbered as D7 (D4)-22-1149-2002 by the dealer against the hirer is allowed and the counter-claim of the hirer against the dealer is dismissed. Interest shall be at 4% per annum from 16 July 1999 to date of realization.

**[38]** In the matter of costs, I hereby award only costs to the dealer to be paid by the hirer. Such costs being on the scale as provided under the Subordinate Court Rules 1980.